

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0866

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MILWAUKEE ALARM COMPANY, INC.,

PLAINTIFF-APPELLANT,

v.

FELMERS O. CHANEY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
FRANK T. CRIVELLO, Judge. *Affirmed and cause remanded with directions.*

FINE, J. This action was brought by Milwaukee Alarm Company in small claims court alleging that Felmers O. Chaney breached an alarm-service contract. A court commissioner granted judgment to Milwaukee Alarm, and Chaney, as was his right under § 799.207, STATS., demanded a trial before the circuit court. As part of his answer, Chaney counterclaimed against Milwaukee Alarm, alleging violations of the Wisconsin Consumer Act, Chapters 421–427,

STATS. The trial court found that Milwaukee Alarm violated the Wisconsin Consumer Act, granted summary judgment to Chaney dismissing Milwaukee Alarm's complaint, and, on Chaney's counterclaim, awarded to Chaney damages, attorney's fees, costs, and expenses. Milwaukee Alarm does not dispute the trial court's determination that the alarm-service agreement between it and Chaney did not comply with the Wisconsin Consumer Act. Rather, Milwaukee Alarm contests on this appeal the trial court's conclusion that the agreement is one regulated by the Act, as well as the trial court's award of attorney's fees. We affirm and remand to the trial court with directions that it award to Chaney his reasonable attorney's fees, costs, and expenses in connection with this appeal.

Our review of a trial court's grant of summary judgment is *de novo*. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We analyze Milwaukee Alarm's claims of trial-court error in turn.

1. Milwaukee Alarm's first assertion of trial-court error is the trial court's determination that the alarm-service contract was an extension of credit under the Act. "Credit" is defined by the Act as, among other things, "the right granted by a creditor to a customer ... to incur debt and defer its payment." Section 421.301(14), STATS.¹ Whether the alarm-service contract between

¹ Section 421.301(14), STATS., provides in full:

"Credit" means the right granted by a creditor to a customer to defer payment of debt, to incur debt and defer its payment or to purchase goods, services or interests in land on a time price basis.

(continued)

Chaney and Milwaukee Alarm granted to Chaney the right to incur debt and defer its payment requires us to interpret the contract and apply the statute. The interpretation of a contract and a statute are matters that we review *de novo*. *Edwards v. Petrone*, 160 Wis.2d 255, 258, 465 N.W.2d 847, 848 (Ct. App. 1990) (contract); *Village of Shorewood v. Steinberg*, 174 Wis.2d 191, 201, 496 N.W.2d 57, 61 (1993) (statute).

By its terms, the alarm-service contract between Milwaukee Alarm and Chaney was effective on October 21, 1991, and “shall continue in effect for five years from the first day of the first full month of services provided hereunder,” subject to annual automatic renewals unless written notice of termination is given by either party sixty days “prior to the expiration of the original or any extended term.” (Underlined words handwritten.) In return, Chaney agreed to pay \$19 per month, billed quarterly. If, however, Chaney terminated or cancelled the contract before the end of the term, which he did, the

There is no doubt but that Chaney is a “customer,” which, as material here, is defined as “a person ... who seeks or acquires ... personal property, [or] services ... for personal, family, [or] household ... purposes.” Section 421.301(17), STATS. A “creditor” is, as material here, “a merchant who regularly engages in consumer credit transactions.” Section 421.301(16), STATS. Given the nature of the alarm-service contract between Milwaukee Alarm and Chaney (a custom Milwaukee Alarm Company printed form) and the undisputed evidence that the Chaney transaction was typical, Milwaukee Alarm is a “creditor” (that is, it satisfied the “regularly engages” element) if the contract gave to Chaney the right to “incur debt and defer its payment.” Milwaukee Alarm does not dispute that it is a “merchant,” which is defined by § 421.301(25), STATS. as follows:

“Merchant” means a person who regularly advertises, distributes, offers, supplies or deals in real or personal property, services, money or credit in a manner which directly or indirectly results in or is intended or designed to result in, lead to or induce a consumer transaction. The term includes but is not limited to a seller, lessor, manufacturer, creditor, arranger of credit and any assignee of or successor to such person. The term also includes a person who by his or her occupation holds himself or herself out as having knowledge or skill peculiar to such practices or to whom such knowledge or skill may be attributed by his or her employment as an agent, broker or other intermediary.

contract obligated him to pay not only the service charges owing for services performed to the date of termination or cancellation, but also “one-half (1/2) the service fees for the balance of the Agreement period.”² (Capitalization in original.)

There are no Wisconsin decisions on point, but the statute as applied to the facts of this case is clear. The alarm-service contract obligated Chaney to pay a declining balance over and above the contracted-for value of the services he received, unless he carried the alarm-service contract to full term. The alarm-service contract between Milwaukee Alarm and Chaney was, therefore, not a payment-for-services-as-rendered agreement, where the customer has no obligation to pay unless he or she receives those services. Rather, the moment Chaney signed the contract he owed money to Milwaukee Alarm that the agreement permitted him to pay over the term of the contract if the contract was carried to term, but which would be accelerated and become immediately due if the contract was terminated or cancelled prior to term. Stated in the words of § 421.301(14), STATS., Chaney “incur[red] debt” the moment he signed the contract (his liability to pay money to Milwaukee Alarm for services not yet provided, and, if he cancelled the contract, for services that would never be provided), and was permitted to “defer its payment” by carrying the contract to term. This distinguishes this case from those on which Milwaukee Alarm relies, where the customers were not liable for any payments beyond those for services they actually received. The trial court ruled correctly that the alarm-service contract was an extension of credit under the Wisconsin Consumer Act.

² Chaney requested cancellation of the alarm-service contract in early January, 1992, less than three months after he signed it, and after he had already paid for three months. One-half of the service fees owing under the contract for the five-year period was thus \$541.50 (57 months x \$19 per month x .5).

2. Milwaukee Alarm's second assertion of trial-court error is the trial court's determination that the alarm-service contract was a "consumer approval transaction" as defined by § 423.201, STATS. This section provides:

Definition. "Consumer approval transaction" means a consumer transaction other than a sale or lease or listing for sale of real property, a sale of goods at auction, the sale or lease of goods for an agricultural purpose or a loan made to finance the sale of goods at auction for an agricultural purpose 1) which is initiated by face-to-face solicitation away from a regular place of business of the merchant or by mail or telephone solicitation directed to the particular customer and 2) which is consummated or in which the customer's offer to contract or other writing evidencing the transaction is received by the merchant away from a regular place of business of the merchant and involves the extension of credit or is a cash transaction in which the amount the customer pays exceeds \$25. "Consumer approval transaction" shall in no event include a catalog sale which is not accompanied by any other solicitation or a consumer loan conducted and consummated entirely by mail.

Milwaukee Alarm does not dispute that its president solicited Chaney both by telephone and face-to-face in Chaney's home. Given our conclusion in part 1, above, that the alarm-service-contract was an extension of credit, we do not have to discuss the dispute over whether Chaney paid to Milwaukee Alarm at least the requisite \$25 when the agreement was signed. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). The trial court ruled correctly that the alarm-service contract was a "consumer approval transaction" under the Wisconsin Consumer Act.

3. Section 425.308, STATS., requires the award to a customer who "prevails in an action arising from a consumer transaction" his or her reasonable attorney's fees, costs, and expenses. *First Wisconsin National Bank v. Nicolaou*, 113 Wis.2d 524, 536, 335 N.W.2d 390, 396 (1983). Milwaukee Alarm complains

that the trial court made its award under § 425.308 without first holding an evidentiary hearing.

Chaney's attorney submitted to the trial court two extensive affidavits recounting the hours and moneys spent representing Chaney in this matter, as well as his expertise and the expertise of an associate in his firm enlisted in that effort. Although contesting Chaney's entitlement to attorney's fees after May 1, 1996, because of Milwaukee Alarm's contention that it "offered to dismiss the case" on that date, Milwaukee Alarm did not seek an evidentiary hearing before the trial court on either Chaney's entitlement to those fees or their necessity or reasonableness. Given the tenor and nature of Milwaukee Alarm's response to Chaney's submissions on fees, costs, and expenses, the trial court was wholly justified in deciding the fees, costs, and expenses issue on the written submissions.

The amount of an award of attorney's fees, costs, and expenses under § 425.308, STATS., is within the trial court's discretion. *Nicolaou*, 113 Wis.2d at 537, 335 N.W.2d at 396. Milwaukee Alarm has not demonstrated how, on this record and on our independent review, *see ibid.*, the trial court erroneously exercised its discretion, especially in light of Milwaukee Alarm's consistent refusal to settle before the expenditure of significant time, effort, and money to defend Chaney against Milwaukee Alarm's claim.

Chaney has prevailed on this appeal. He is thus entitled to reasonable attorney's fees, costs, and expenses incurred in defending this appeal. *Id.*, 113 Wis.2d at 541, 335 N.W.2d at 398. Accordingly, this matter is remanded to the trial court for a determination of those fees, costs, and expenses. Chaney shall submit to the trial court within fifteen days of the trial court's receipt of the remittitur a detailed affidavit of attorney's fees, costs and expenses incurred in the

defense of this appeal. *See* § 808.08, STATS. (Further proceedings in trial court.). If Milwaukee Alarm desires an evidentiary hearing on those fees, costs, and expenses, it shall request such a hearing within five days of service upon it of the affidavit submitted to the trial court by Chaney. If Milwaukee Alarm does not request an evidentiary hearing within the five-day period, it may submit, within fifteen days of service upon it of the affidavit submitted to the trial court by Chaney, written arguments supported by whatever evidentiary material it deems appropriate, and the trial court shall make an award based on the written submissions. If Milwaukee Alarm timely notifies the trial court that it wants an evidentiary hearing, such a hearing shall be scheduled by the trial court forthwith.

By the Court.—Order affirmed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

